Filed 1/11/10 McVeigh v. General Mills Sales CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TOM McVEIGH, Plaintiff and Appellant, v. GENERAL MILLS SALES, INC., Defendant and Respondent.	G042293 (Super. Ct. No. 30-2009-00121653) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Charles Margines, Judge. Affirmed.

Tom McVeigh, in pro. per., for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Brad Seiling and Joanna S. McCallum for Defendant and Respondent.

Tom McVeigh appeals from a judgment that dismissed this unlawful business practices action after a demurrer was sustained without leave to amend. McVeigh argues the complaint sufficiently alleged General Mills Sales, Inc. (General Mills) promoted one of its products by means of an illegal gambling device. We conclude McVeigh lacks standing to sue and for that reason affirm.

FACTS

The complaint alleged "[McVeigh] bought [General Mills'] 'Fruit Gushers' product based on the outside label that states 'YOU COULD WIN CASH.'" He opened the package to find no prize, only a message that said "TRY AGAIN." It alleged such conduct caused damage to McVeigh and the general public because General Mills distributed Fruit Gushers throughout California and promoted it through the sweepstakes advertised on the box. A single cause of action was set out for violation of the unfair competition law (Bus. & Prof. Code, § 17200 et. seq.). The relief sought was a preliminary and permanent injunction, restitution of profits, and costs of suit.

General Mills demurred on two grounds. It asserted McVeigh did not have standing to sue under the unfair competition law because he did not suffer an injury in fact. On the merits, the demurrer argued the complaint failed to state a cause of action because the sweepstakes was not illegal as a punchboard or slot machine. The trial court agreed on the second point, saying "the package of Fruit Gushers . . . does not fall within the definition of any illegal gambling device defined in Penal Code section 330 et seq."

DISCUSSION

The unfair competition law (Bus. & Prof. Code, § 17200 et seq.) prohibits "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (Bus. & Prof. Code, § 17200.)[1] The available remedies are an injunction and restitution of money or property obtained by unfair competition.

[1] All subsequent statutory references are to the Business and Professions Code.

(§ 17203.) Suit may be brought by an individual only if he is "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." (§ 17204.) To show an injury in fact, this court has held one who has purchased goods or services must allege they were not what he wanted, were unsatisfactory, or were worth less than the price paid. (*Hall v. Time, Inc.* (2008) 158 Cal.App.4th 847, 855; accord, *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1591; *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105, 114-115.)[2]

McVeigh lacks standing to sue. The complaint fails to allege injury in fact. McVeigh alleges he bought Fruit Gushers because the box label promised a chance to win cash. But he received that chance. Far from claiming it was not what he wanted, he alleges he bought the product *for* the chance to win a prize. Nor is there any claim the chance was not worth the price paid, or it was unsatisfactory. The same is true of the product itself. There is no allegation the snacks were was not as advertised, not worth the price, or wanting in any other way.

McVeigh argues his injury was the price paid for the Fruit Gushers. But that is not enough. Simply buying a product does not establish injury in fact for standing purposes where the buyer receives what he paid for, that is, the benefit of his bargain. (*Peterson v. Cellco Partnership, supra*, 164 Cal.App.4th at p. 1591.)

[2] The issue of what must be alleged to establish standing under section 17204 is currently before the Supreme Court. (*Kwickset Corporation v. Superior Court (Benson)* (review granted June 10, 2009, S171845.)

The demurrer without leave to amend was properly granted, albeit it for a different reason that the one relied on by the trial court.[3] The judgment appealed from is affirmed. Respondent is entitled to costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.

[3] General Mills requests judicial notice of three photocopies of pages from three internet sites. Two purport to be histories of the punchboard, and the third a dictionary definition of "punchboard." It moved for judicial notice of the first two below, but the trial court never ruled on the motion. The motion for judicial notice filed October 14, 2009, is denied. Since we do not reach the issue whether General Mills' promotion was an illegal punchboard, the request is moot. Moreover, we decline to consider on appeal evidence not admitted below or, in the case of third item, never offered below.